No. 89-324

In The

Supreme Court of the United States

October Term, 1989

P*I*E NATIONWIDE, INC.,

Petitioner,

v.

BOBBY WAYNE PERRY, PHILIP ANTHONY EDDIE, ERNEST CORDELL JONES, JAMES A. MATHIS and GARY R. HYDER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1144 (a), precludes Tennessee State law causes of action against the employer for fraud in the inducement, coercion and misrepresentation with regard to acts leading up to, but prior to the actual commencement or establishment of an employee stock ownership plan (ESOP)?

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COUNTER-STATEMENT OF THE CASE

This action was brought in 1986 by the respondents in the United States District Court for the Middle District of Tennessee at Nashville based upon diversity of citizenship. The respondents are citizens and residents of the State of Tennessee. The petitioner, their employer, is a Florida corporation. The Complaint asserted that P*I*E wrongfully induced respondents to participate in an employee stock investment plan contrary to Tennessee state common law. Respondents also allege that their participation in the stock investment plan was obtained through fraud, coercion, misrepresentation, promissory estoppel, lack of consideration and breach of fiduciary duty. Respondents sought rescission, refund of the monies which were withheld from them and damages.

P*I*E filed a motion to dismiss alleging that the ESOP was a plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001, *et seq.* and the Internal Revenue Code. As such, the petitioner asserted that its conduct is regulated under the terms of ERISA and Internal Revenue Code.

For purposes of this appeal, the factual background of this controversy is, as it relates to the motion to dismiss, undisputed. Prior to the offering of the stock investment plan to the respondents, P*I*E, a wholly owned subsidiary of I.U. International Corporation, a diversified service company based in Philadelphia, Pennsylvania, entered into negotiations for the sale of P*I*E to Maxitron, Inc.

As part of the terms and conditions of the sale it is believed that a precondition to the sale was that the

respondents and approximately eighty-five (85%) percent of other eligible employees elected to join and participate in the stock investment plan. In exchange for participating in the stock investment plan, employees had to agree to accept an irrevocable fifteen (15%) percent reduction in salary for a period of five (5) years beginning January 1, 1986, and ending December 31, 1990. Although the stock prospectus issued by P*I*E with the stock investment plan indicated there had been negotiations between P*I*E and Maxitron, it failed to disclose these preconditions for the sale.

The respondents were employees of P*I*E and were stationed at P*I*E's Nashville terminal. Bobby Wayne Perry had been employed since September, 1973, Philip Anthony Eddie since April, 1978, Ernest Cordell Jones since June, 1973, James H. Mathis since May, 1972 and Gary R. Hyder since July, 1973. On various dates prior to January 1, 1986, the actual day of which is not material for purposes of this appeal, the respondents signed the necessary documents to participate in the stock investment plan. Their signatures and election to enter the plan was obtained through coercive statements made by and through representatives of P*I*E and material misrepresentations made by representatives of P*I*E. There were misrepresentations in the plan prospectus and certain coercive actions taken by P*I*E including, but not limited to, termination of some employees who refused to join in the stock investment plan.

The District Court referred the petitioner's motion to Magistrate Kent Sandidge, III, for report and recommendations. Upon argument, Magistrate Sandidge recommended that the Motion to Dismiss be denied. *See,*

Appendix B, Petition for Writ of Certiorari, at A-15. The District Court accepted the ultimate recommendation of the magistrate but issued its own lengthy opinion denying the Motion to Dismiss and overruling the objections filed by the petitioner. *See, Id.*, Appendix C at A-30. The petitioner timely moved for the appropriate amendment to the Order so that interlocutory appeal could be sought. The respondents later joined in the Motion. The petitioner's request for permission to appeal was granted by the United States Court of Appeals for the Sixth Circuit. The Court of Appeals issued an opinion affirming the District Court finding that there was no ERISA preemption with respect to the fraud, misrepresentation, coercion and promissory estoppel claims of the respondent. The Sixth Circuit reversed the district court's decision on the issues of breach of fiduciary duty and lack of consideration.

The petitioner filed a timely Motion for Rehearing En Banc which was denied. *See, Id.* at A-45. Thereafter, the petitioner filed a Motion for Stay of the mandate to allow the adequate time to file the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT UNITED STATES COURT OF APPEALS IS NOT INCONSISTENT WITH COURT'S DECISIONS IN *SHAW V. DELTA AIRLINES* 463 U.S. 85 (1983), OR *PILOT LIFE INSURANCE COMPANY V. DEDEAUX* 481 U.S. 41 (1987).

It is certainly clear that Congress sought to preempt certain types of state regulation and state law based

claims against the fiduciaries of an employee benefit plan. Section 514 of the Employee Retirement Income Security Act provides in part:

> The provisions of the sub-chapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . .

29 U.S.C. Section 1144(a). Thus, it is clear that the broad preemptive provision does not preempt all state laws, rather it preempts them only insofar as the laws relate to, i.e. attempt to regulate the plan. This Court has given a very broad construction the term "relate to". However, the opinions of this Court have not been as broad as petitioner would suggest. *Mackey v. Lanier Collections Agency and Service, Inc.* 486 U.S. ___, 100 L. Ed. 2d 836 (1988). *Fort Halifax Packing Co., Inc. v. Coyne* 482 U.S. 1 (1987).

In the instant petition, the petitioner urges this Court to extend the preemptive scope of ERISA beyond what it has previously declined to do as noted in *Shaw v. Delta Airlines, Inc.* 463 U.S. 85 (1983). The retreat of the Court in *Shaw* is a recognition that the preemption of state law claims may indeed involve a two-pronged test for preemption. If the state law is independent of some other federal scheme, preemption exists. If, on the other hand, it is tied to some similar scheme, then preemption will exist only insofar as the law prohibits something which is lawful under ERISA. 463 U.S. at 108-109, *Alessi v. Raybestos Manhattan, Inc.* 451 U.S. 504, 524-525 (1981). Certainly, petitioners are not suggesting that their acts

which are illegal under Tennessee law would be legal within the federal law or regulatory scheme.

As noted in *Shaw*, state action and some state laws will affect employee benefit plans in a remote or peripheral manner. *Id.* 463 U.S. at 100, *See also, Mackey*, at 846.

This Court has held that certain criteria must be reviewed prior to a determination that preemption will be mandated.

> [W]hen Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law preempted by federal legislation whenever the "challenged state [law]" stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Perez v. Campbell* 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U. S. 311, 317 (1981). As Congress has determined, the purpose of ERISA is not to protect the employer from an attack on its fraudulent acts, rather it is to protect the beneficiary or employee and to provide the appropriate *remedies* where necessary to accomplish this purpose. 29 U.S.C. Section 1001(b). Preemption of the respondents' claims would not be consistent with this objective nor the prior decisions of this Court.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THOSE OF THE OTHER CIRCUITS.

Petitioner argues that the Sixth Circuit now conflicts with numerous decisions of other circuit courts of appeal.

The opinion below, as demonstrated hereinafter, is not in conflict with those decisions relied upon by the petitioner.

In *Cefalu v. B. F. Goodrich Co.*, 871 F. 2d 1290 (5th Cir. 1989) the Fifth Circuit Court of Appeals held that the Plaintiff's claim to **recover additional pension benefits** was preempted. The basis of Cefalu's claim was that "representatives of Goodrich orally assured him that his '**retirement benefits**' would be greater that the amount ultimately provided to him." *Id.* at 1292 (emphasis added). The facts in the case at bar are clearly distinguishable from the *Cefalu* case in that Mr. Cefalu sought greater benefits and an oral modification of a plan. The oral modification, alone, conflicts with ERISA. *Id.* at 1296-97, *see, also,* 29 U.S.C. Section 1102(a)(1).

The respondents do not seek a modification of the plan in this case. The respondents seek rescission and money damages for the fraudulent and coercive conduct of the petitioner procuring their entrance into a plan that, but for the wrongful conduct, would not have existed.

In *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988), the Tenth Circuit Court of Appeals held that contractual claims for an increase in pension benefits were again preempted by ERISA. *Id.* at 1263-64. Again, the respondents in the case at hand are not seeking an increase in pension benefits, and *Straub* is not in conflict with the lower court's decision.

In *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), the Eighth Circuit Court of Appeals held contractual claims to increase benefits were preempted by

ERISA. However, in so holding, the Court at the outset noted:

> In essence, Anderson's claim is that he is entitled, *as a matter of contract*, to have certain health benefits *added to his welfare benefit plan* which is applicable to him as a retired Morrell employee.

Id. at 873 (emphasis added). Holding the claim to be preempted, the court refused to draw a substantive distinction between "an action to recover benefits . . . and an action to establish . . . benefits." *Id.* at 875.

In *Farlow v. Union Central Life Insurance Co.*, 874 F.2d 791 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that claims of misrepresentation and negligence as to the benefits to be received and the insurance coverage that existed in a welfare benefit plan were preempted. Once again, however, is the distinction that the claim in *Farlow* was in regard to the benefits of the plan, not the inducement to join.

In its analysis, the Court explained that unlike state law claims not preempted by ERISA, "the conduct alleged . . . is not only contemporaneous with . . . but the alleged is intertwined with the refusal to pay benefits." *Id.* at 794. In the case at bar, the misconduct alleged is in no way related to a refusal to pay benefits. To the contrary, the respondents' claims involve the wrongful acts leading up to, but prior to, the formation of any benefit plan.

In affirming the District Court, the Sixth Circuit Court of Appeals followed the test set forth in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). *Perry v. P*I*E Nationwide, Inc.* 872 F.2d 157, 162 (6th Cir. 1989). In deciding that ERISA

provided no remedy for the wrongs committed by the Petitioner, the court held that the preemption provisions of ERISA were not applicable under these facts. *Id.* Important to the holding is the preemption of two claims which the court held did "relate to the plan." *Id.* Implicit in this holding is the recognition by the Court that if rescission is decreed by the district court, then the claims obviously do not relate to the plan. One cannot seek interfund remedies available only to participants if one is not a participant.

In summary, the holding by the Sixth Circuit Court of Appeals in this case does not represent a split of authority among the Circuits regarding the preemption provision of ERISA. The District and Appellate Courts found distinguishing facts prevalent in this action which justifiably preclude preemption of the respondents' claims.

The respondents' have not sought benefits under a plan nor "related to" a plan within the meaning of ERISA. The lower court's recognition of the claim of respondents is not in conflict with the prior decisions of this Court or any lower court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents Bobby Wayne Perry, Philip Anthony Eddie, Ernest Cordell Jones, James A. Mathis and Gary R. Hyder, respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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